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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT BERRY et al., Plaintiffs and Respondents, v. STATE FARM GENERAL INSURANCE COMPANY, Defendant and Appellant.	G055740 (Super. Ct. No. 30-2016-00862048) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed.

Pacific Law Partners, Matthew F. Batezel and Anne M. Master for Defendant and Appellant.

Child & Marton and Bradford T. Child for Plaintiffs and Respondents.

* * *

Plaintiffs Robert Berry and Kristy Velasco-Berry (the Berrys), Mary DiDomenico and Marc DiDomenico (the DiDomenicos; collectively Plaintiffs) sued State Farm General Insurance Company (State Farm) for denying homeowner insurance benefits for water damage to a residence sold by the Berrys to the DiDomenicos. The trial court granted in part and denied in part State Farm's motion for summary judgment or, in the alternative, summary adjudication (MSJ), finding triable issues of material facts as to whether the Berrys engaged in intentional conduct and whether State Farm had been unreasonable in its denial of a defense. Following a stipulated judgment, State Farm appeals, arguing the trial court should have granted summary judgment because undisputed facts showed that coverage was precluded by California case law as well as the underlying policy's terms and conditions defining what types of claims were covered and excluded. Finding the existence of triable issues of material facts, we affirm the trial court's denial of the MSJ.

I

FACTS AND PROCEDURAL HISTORY

A. Postsale Discovery of Water Damage at the Property

In the summer of 2014, the Berrys entered into a contract to sell their Newport Beach residential property (Property) to the DiDomenicos. At that time, State Farm insured the Berrys' interest in the Property through a homeowners insurance policy (Policy) and the Property was apparently unoccupied.

The DiDomenicos moved in on August 31, 2014, two days after escrow closed, and discovered severe water damage at the Property. They requested the Berrys submit a property damage claim to State Farm, but the Berrys initially declined to do so because they did not believe the DiDomenicos' claims were legitimate and that making an insurance claim "would appear as if the Berrys were admitting fault."

B. Arbitration Against the Berrys and Tender to State Farm

Pursuant to the purchase and sale agreement for the Property, the DiDomenicos pursued arbitration against the Berrys for the water damage. The arbitration complaint against the Berrys alleged three causes of action: (1) breach of statutory duties (regarding residential real property disclosures pursuant to Civil Code § 1102 et seq.); (2) fraud; and (3) negligent misrepresentation.

At mediation with the DiDomenicos, the Berrys became convinced by an atypical water bill that the purported water damage might be a legitimate insurance claim and subsequently submitted a claim to State Farm, requesting two types of Policy benefits: (1) property damage payment; and (2) a defense and indemnity against the arbitration (collectively the Berry Claim).

C. State Farm's Denial

State Farm reviewed the information submitted and denied the Berry Claim. With regard to the Berrys' request for property damage payment, State Farm concluded there was no evidence of a sudden or accidental discharge of water or steam. Instead, State Farm found that the water damage appeared to be the result of continuous or repeated seepage or leakage, and therefore the request was excluded by express Policy language.[1]

With regard to the Berrys' request for defense and indemnity against the arbitration, State Farm asserted four grounds for its denial that are relevant here: (1) the economic damages claimed by the DiDomenicos, as buyers of the Property, did "not qualify as property damage" covered by the Policy; (2) even if "property damage" could be found, the intentional acts exclusion of the Policy precluded coverage because the DiDomenicos based their claims on the Berrys' failure to properly disclose the water

[1] State Farm also asserted that the loss was not reported in a timely manner as required by the Policy, which is not argued on appeal.

damage; (3) a Policy exclusion applied based upon the Berrys' information that a leak in a refrigerator line had occurred while they still owned the Property; and (4) the Policy had been canceled when escrow closed and therefore any damage that subsequently occurred was not covered because the Policy was no longer in effect.[2]

Following its initial denial of benefits, State Farm communicated with Cory Ennen, the DiDomenicos' contractor, regarding the water damage at the Property. According to Plaintiffs, Ennen communicated to State Farm his belief that a previously unconsidered flooding had occurred at the Property. If true, the flood would have occurred while the Property had been unoccupied during escrow and subsequent to the Berrys' representations which were at issue in the arbitration. However, at no time did State Farm change its position of denying the Berry Claim.

D. Settlement of the Arbitration and Assignment of Claims

State Farm did not represent the Berrys at the arbitration. The Berrys paid their own legal defense fees and ultimately settled with the DiDomenicos. In addition to the payment of money to the DiDomenicos, the settlement included an assignment of claims by the Berrys to the DiDomenicos. Specifically, the Berrys assigned all assignable claims they possessed against State Farm for its denial of the Berry Claim. The claims expressly not assigned were the Berrys' claims against State Farm for emotional distress suffered as result of the denial.

E. This Action and State Farm's MSJ

Shortly after the settlement of the arbitration, the Berrys and the DiDomenicos joined as Plaintiffs to file this action against State Farm: the DiDomenicos

[2] The fifth ground for State Farm's denial, which is not at issue in this appeal, was that as far as damages claims were based upon resulting mold, they were expressly excluded by the Policy's mold exclusion.

pursuing claims as the assignees of the Berrys' claims against State Farm, and the Berrys directly pursuing their emotional distress claims against State Farm. The gravamen of the operative second amended complaint is that State Farm breached its contractual obligations owed to the Berrys under the Policy when it denied the Berry Claim.

State Farm filed its MSJ, but the trial court granted summary adjudication only as to State Farm's denial of property damage reimbursement, finding the issue time-barred.[3] The trial court denied the MSJ for the remainder of the issues, which primarily dealt with State Farm's denial of a defense for the Berrys in the arbitration, because triable issues of material facts existed as to (1) whether the Berrys had engaged in intentional conduct; and (2) whether State Farm had been unreasonable in denying the Berrys defense.

Subsequently, State Farm and the Plaintiffs stipulated to a judgment which, among other things, preserved State Farm's right to file its instant appeal of the trial court's denial of the MSJ. (See *City of South San Francisco v. Mayer* (1998) 67 Cal.App.4th 1350, 1353-1354, fn. 2 [judgment entered pursuant to stipulation was appealable where judgment and stipulation were of type in which stipulation was with prejudice on all claims so that appeal from judgment might be taken].)

II

DISCUSSION

A. Standard of Review and Relevant Law

The trial court's partial grant of State Farm's MSJ, deeming time-barred all claims based upon State Farm's denial of the Berrys' request for property damage payment, has not been appealed and therefore is not at issue here. (See *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439.)

[3] Before State Farm filed its MSJ, plaintiff Kristy Velasco-Berry dismissed all of her claims in this matter.

We review de novo the trial court's denial of the remainder of State Farm's MSJ to determine whether any triable issue of material fact exists. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) "We do not resolve factual issues but ascertain whether there are any to resolve." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 25.) State Farm as the moving party bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If State Farm carries this burden, the burden of production shifts to Plaintiffs who must make a prima facie showing that a triable issue of material fact exists. (*Ibid.*) However, State Farm at all times bears the burden of persuasion that there is no triable issue of material fact and it is entitled to judgment as a matter of law. (*Ibid.*) State Farm's papers are strictly construed and Plaintiffs' papers are liberally construed, with all doubts as to the propriety of granting summary judgment resolved in favor of denying it. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.) Similarly, we strictly construe State Farm's evidence and liberally construe Plaintiffs' evidence. (*City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 886.)

With regard to an insurer's duty to defend its insureds, an insurer "must defend a suit which *potentially* seeks damages within the coverage of the policy." (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275.) In interpreting the terms of an insurance policy, if the contractual language is clear and explicit, it governs; if it is ambiguous then it is first interpreted to protect the objectively reasonable expectations of the insured and, if the ambiguity is still not resolved, then the policy language is interpreted against the insurer. (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 321.) "In an action in which some claims are potentially covered and others are not, the insurer must defend the entire action, including those claims for which there is no potential coverage under the policy—even if [noncovered] claims predominate." (*American States Ins. Co. v. Progressive Casualty Ins. Co., supra*, 180 Cal.App.4th at

p. 26.) An insurer necessarily has a greater burden than the insured because the insurer "must present undisputed facts that eliminate any possibility of coverage." (*Id.* at p. 27.)

Accordingly, we review de novo whether State Farm's MSJ presented undisputed facts that eliminated any possibility of a duty to defend the Berrys in the arbitration.

B. Policy Period in Dispute

State Farm argues summary judgment should have been granted as there was no potential for coverage under the Policy because it was in effect only until the close of escrow and so its express policy exclusion for property "currently owned by any insured" (i.e., the Property while owned by the Berrys) necessarily precluded coverage for the water damage claimed in the arbitration. This argument relies upon a factual premise that the Policy terminated with the close of escrow, which we find sufficiently disputed by Plaintiffs, creating a triable issue of material fact as to whether the exclusion eliminated any possibility of State Farm's duty to defend the Berrys.[4]

Generally, the terms of a policy govern the "occasions, method, and means of cancellation by private agreement." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 758.) With regard to homeowners insurance, an insurer must provide written notice of a policy cancellation. (Ins. Code, § 677.4.) Based upon declarations of its custodian and Claim Team Manager, State Farm contends the Policy undisputedly terminated on the same day the Berrys ceased owning the Property, with the close of escrow on August 29, 2014. In opposition, Plaintiffs contend the Policy terminated no earlier than September 4 or 19, 2014, which represents a grace period of 30 or 45 days,

[4] During oral argument, State Farm's counsel characterized Plaintiffs' counsel's argument on this issue as "disingenuous." We remind counsel of the State Bar's encouragement that its members "refrain from conduct that inappropriately demeans another person." (Cal. Attorney Guidelines of Civility and Professionalism (2007) § 14, par. d.)

respectively, following the Policy's automatic renewal during escrow. If Plaintiffs' contention is correct, the Policy remained in effect after the Berrys no longer owned the Property and after the water damage was deemed to have legally occurred, which the parties agree was August 31, 2014.

In support of their contention, Plaintiffs offered the declaration of plaintiff Robert Berry to argue the Policy terminated with the conclusion of said grace period, when the Berrys no longer owned the Property. According to his declaration, prior to the close of escrow, Berry had a phone conversation with a State Farm representative regarding the Policy's termination date. Berry claims he did not cancel the Policy and did not receive a written notice of cancellation. Berry also claims the representative stated the Policy would have a grace period of 30 or 45 days after it automatically renewed on August 5, 2014.

In its MSJ papers, State Farm objected to the relevant portion of Robert Berry's declaration testimony on the grounds of relevance, foundation, lack of personal knowledge, as well as for being vague, ambiguous, and argumentative. The trial court made no evidentiary rulings so we overrule State Farm's objections here and consider Berry's relevant declaration testimony as competent and admissible evidence. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526-527.)

Importantly, State Farm does not cite to any dispositive legal rule or Policy provision establishing that the Policy was cancelled or terminated at the close of escrow. For example, there is no reference to a Policy provision stating a sale of the Property was sufficient to terminate the Policy. Nor has State Farm produced any written notice of cancellation sent to the Berrys or even claimed that such written notice was created. Additionally, State Farm does not challenge the veracity of Robert Berry's declaration testimony claiming he spoke with a State Farm representative, nor does it demonstrate its claim that the trial court found it undisputed that the Policy terminated on August 29,

2014.[5] In effect, State Farm simply relies upon its internal documentation that the Policy was terminated on August 29, 2014. Liberally construing Berry's declaration testimony and favoring resolving doubt in support of denying summary judgment, we find a triable issue of material fact exists as to when the Policy terminated. (See *City of Vista v. Robert Thomas Securities, Inc.*, *supra*, 84 Cal.App.4th at p. 886; see also *Hamburg v. Wal-Mart Stores, Inc.*, *supra*, 116 Cal.App.4th at p. 502.)

This disputed factual issue means there is a possibility the Policy was still in effect at the time the water damage is deemed to have legally occurred (i.e., when the DiDomenicos discovered the water damage on August 31, 2014). Under such a scenario, the Policy's exclusion for damage to property owned by the Berrys, by its unambiguous terms, would not have precluded coverage for the arbitration because the Property was owned by the DiDomenicos (and not the Berrys) at that time. Accordingly, State Farm's argument that the Policy's "own property" exclusion entitled it to summary judgment fails.

C. Potential for Coverage Based Upon Extrinsic Evidence

State Farm also argues that an additional and independent ground for granting summary judgment existed based upon the Policy's exclusion for intentional conduct. We find that, despite a lack of citation to extrinsic evidence in the arbitration record, there is a triable issue of material fact as to whether extrinsic evidence of a potentially nonintentional occurrence which caused the water damage was communicated to State Farm so that it triggered a duty to defend.

[5] State Farm cites to the clerk's record on appeal that the trial court found it undisputed by the parties that the Policy ended on August 29, 2014. However, the record cited by State Farm does not demonstrate any such finding by the trial court and, in any event, it would have no binding effect on this court's de novo review of the MSJ.

The Policy defines State Farm's duty to defend beginning with its "Coverage L," which states in pertinent part: "If a claim is made or a suit is brought against an insured for damages because of . . . property damage to which this coverage applies, caused by an occurrence, we will: [¶] . . . [¶] . . . provide a defense at our expense by counsel of our choice."

The Policy defines "occurrence," in pertinent part, as follows: "'occurrence' . . . means an accident, including exposure to conditions, which first results in: [¶] . . . [¶] b. property damage; [¶] during the policy period. All bodily injury and property damage resulting from one accident, series of related accidents or from continuous and repeated exposure to the same general conditions is considered to be one occurrence." The Policy defines "property damage," in pertinent part, as "physical damage to or destruction of tangible property, including loss of use of this property."

State Farm argues the following intentional conduct exclusion applied: "Coverage L [does] not apply to: [¶] . . . property damage: [¶] (1) which is either expected or intended by the insured; or [¶] (2) which is the result of willful and malicious acts of the insured." In other words, State Farm argues it did not have a duty to defend because the claims in the arbitration were expressly excluded as claims of property damage caused by intentional conduct.

According to the record before this court, State Farm is correct that the complaint in the arbitration alleged claims sounding only in fraud (and not negligence) and the resulting settlement agreement between the Berrys and the DiDomenicos reflected this description.[6] It is well accepted that an "insured may not speculate about unpled third party claims to manufacture coverage." (*Hurley Construction Co. v. State*

[6] Although the third cause of action in the Statement of Claims alleged negligent misrepresentation, it is properly understood as a subspecies of fraud rather than being based upon a theory of nonintentional conduct. (*Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 861-862.)

Farm Fire & Casualty Co. (1992) 10 Cal.App.4th 533, 538.) Accordingly, State Farm satisfied its initial burden of production in arguing that the Policy's intentional conduct exclusion excused its duty to defend the Berrys. (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.) However, this point is not dispositive in determining the issue of whether the Berrys' request for a defense was properly denied as a matter of law.

The issue remains unresolved because a duty to defend can arise when an insurer has knowledge of facts showing a potential for coverage even if the complaint fails to allege such facts. (*Gray v. Zurich Insurance Co., supra*, 65 Cal.2d at p. 277.) Indeed, it is a "settled rule that the insurer must look to the facts of the complaint and extrinsic evidence, if available, to determine whether there is a potential for coverage under the policy and a corresponding duty to defend." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 25.) Further, it is well established that even after a valid, initial denial of defense, later developments may impact the insurer's duty to defend (*Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928, 946), and "'a bare "potential" or "possibility" of coverage [is] the trigger of a defense duty.'" (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 520, citing *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300.)

We find that a later development demonstrating a bare potential for coverage may have occurred in this matter. Based upon the declaration testimony of their contractor Ennen, Plaintiffs met their burden of production to oppose the MSJ by demonstrating a potentially nonintentional cause of the water damage at issue in the arbitration. Specifically, Ennen opined the water damage was caused by a flooding which occurred sometime between July 17, 2014 and the discovery of the water damage by the DiDomenicos on August 31, 2014. Based upon the parties' papers, it appears to be undisputed that the Property was unoccupied during this time frame, supporting an inference that the flood was not intentionally caused. Further, Ennen claims his opinion was provided to State Farm on or about April 22, 2015, when he spoke with State Farm

adjuster Danny Kwong, about nine days after State Farm initially declined to defend the Berrys. A State Farm letter to the Berrys dated July 14, 2015 (authenticated by State Farm's Claim Team Manager) confirmed that State Farm and Ennen indeed spoke on April 22, 2015.[7]

State Farm objected to Ennen's expert opinion arguing it lacked foundation and suffered from an insufficient basis demonstrated by Ennen's deposition testimony showing he had not considered an alternative potential cause of the water damage (a leaking refrigerator water dispenser). Again, it appears the trial court made no evidentiary rulings so we overrule State Farm's objections here and consider Ennen's relevant declaration testimony as competent and admissible evidence. (See *Reid v. Google, Inc.*, *supra*, 50 Cal.4th at pp. 526-527.) We find that Ennen's opinion is not rendered inadmissible by his lack of considering an alternative cause of the water damage. (See *Sarti v. Salt Creek Ltd*. (2008) 167 Cal.App.4th 1187, 1210-1211.) More importantly, we find the weight of Ennen's expert opinion immaterial for the purposes of our review here.

For the purposes of adjudicating State Farm's MSJ, the admissibility of Ennen's actual expert opinion is secondary to the fact that he claims his opinion was communicated to State Farm on April 22, 2015. This communication is what creates a factual issue as to whether State Farm possessed extrinsic evidence of a potentially nonintentional cause of the water damage. "Unresolved factual disputes impacting insurance coverage do not absolve the insurer of its duty to defend. 'If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would

[7] In contrast to the Ennen's version of events, the State Farm letter claims that "[Ennen] reported that there was no evidence of a sudden discharge of water and that there were no obvious signs of a leak from the exterior of the wall space." Of course, the fact that Ennen and State Farm disagree as to what was communicated only further supports that a triable issue of material fact exists.

establish a possibility of coverage and thus a duty to defend.'" (*Howard v. American National Fire Ins. Co.*, *supra*, 187 Cal.App.4th at p. 520.)

Based upon this record, while it is true the arbitration complaint only pleaded failure to disclose claims, we liberally construe Ennen's testimony (see *City of Vista v. Robert Thomas Securities, Inc.*, *supra*, 84 Cal.App.4th at p. 886), and find a triable issue of material fact exists as to whether State Farm had knowledge of extrinsic evidence that created a bare potential of coverage which triggered a duty to defend the Berrys in the arbitration. (*Howard v. American National Fire Ins. Co.*, *supra*, 187 Cal.App.4th at pp. 519-520.) State Farm's argument that the Policy's "intentional conduct" exclusion entitled it to summary judgment fails.

D. This Case is not Controlled by Warner *and Related Case Law*

Finally, State Farm contends summary judgment should have been granted because the arbitration against the Berrys was for damages arising not from physical damage to the Property but for failure to disclose its true condition at the time of sale. Specifically, State Farm relies upon the precedent of *Warner v. Fire Ins. Exchange* (1991) 230 Cal.App.3d 1029 (*Warner*), and related case law to argue that damages arising from misrepresentation and fraud-based claims are "economic injuries" that do not constitute the type of "property damage" covered by a homeowner's insurance policy as a matter of law.[8]

[8] Specifically, State Farm cites *Warner v. Fire Ins. Exchange*, *supra*, 230 Cal.App.3d at pages 1034-1035; *Safeco Ins. Co. v. Andrews* (9th Cir. 1990) 915 F.2d 500, 501-502; *Davis v. Farmers Insurance Group* (2005) 134 Cal.App.4th 100, 107; *Miller v. Western General Agency, Inc.* (1996) 41 Cal.App.4th 1144, 1151; *Dykstra v. Foremost Ins. Co.* (1993) 14 Cal.App.4th 361, 366; and *Devin v. United Services Auto. Assn.* (1992) 6 Cal.App.4th 1149, 1159.

In opposition, Plaintiffs cite three federal trial court cases on MSJ applying Hawaiian law.[9] We find the cases offered by State Farm to be inapposite to this matter based upon the factual distinction that none of them involved a claim of extrinsic evidence demonstrating a nonintentional cause of the underlying property damage, which materialized after the facts supporting claims of misrepresentation. For example, in *Devin v. United Services Auto. Assn.*, *supra*, 6 Cal.App.4th at page 1155, this court observed that after the insurer's denial of a defense, the insureds did not communicate any "additional facts" suggesting how the tendered claims might be covered by the underlying policy. Also, in *Dykstra v. Foremost Ins. Co.*, *supra*, 14 Cal.App.4th at pages 368-369—another of the cases cited by State Farm—this court explicitly searched the record for any extrinsic facts beyond the underlying complaint that could have given rise to the insurer's duty to defend, before concluding that no such "additional facts" existed.

In contrast, it is documented in this case that after its initial denial of a defense, State Farm had a discussion with contractor Ennen which Plaintiffs contend revealed a possible nonintentional cause of the water damage. If true, the cause could have arisen independent of and subsequent to the facts pleaded in support of the misrepresentation and fraud-based claims in the arbitration complaint. Plaintiffs argue this constituted extrinsic evidence (see discussion, ante, at pt. C) which we find are "additional facts" distinguishing this matter from the precedent of *Warner* and its progeny. Accordingly, the cases cited by State Farm do not compel summary judgment here.

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[9] *State Farm Fire & Casualty Co. v. Chung* (D. Haw. 2012) 882 F.Supp.2d 1180, 1191; *RLI Insurance Company v. Thompson* (D. Haw., Apr. 12, 2010, Civ. No. 09-00345 SOM/BMK) 2010 WL 1438925, * page 9; and *State Farm Fire & Casualty Co. v. Thompson* (D. Haw., May 20, 2010, Civ. No. 09-00530 ACK-LEK) 2010 WL 2017101, * pages 9-10.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

GOETHALS, J.